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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Electronic Industries Association, acting in behalf of its Government Products Division, respectfully files this brief *amicus curiae* in support of the Petition for Certiorari filed in behalf of G. L. Christian and Associates in the instant case. Both counsel for Petitioner, G. L. Christian and Associates and counsel for Respondent, United States of America have given their consent to the filing of this brief.

The Electronic Industries Association (herein referred to as EIA) is composed of approximately 300 member companies engaged in the manufacture of electronic equipment and components. It is the national association representing the fifth largest manufacturing industry in the United States, with gross annual sales in excess of $10 billion. The vast majority of its members deal with the Department of Defense as prime contractors, subcontractors, or both. Also, each company, acting as a prime contractor for a major weapons system or large projects, awards literally thousands of subcontracts, to which many provisions of the Armed Services Procurement Regulation are applicable. Therefore, as representatives of members which engage in more than $5 billion of prime and subcontracts with the military departments each year, EIA is concerned over the far-reaching impact the Court of Claims' decision could have on future procurement of electronic equipment and parts to meet our nation's needs for national security.

The Issue

The specific issue is whether Section VIII of the Armed Services Procurement Regulation was issued under statutory authority and has the full force and effect of law and if so, whether its provisions can be made part of a contract even though such inclusion was not agreed upon by both parties at the time of the contract. The broader issue is whether contract rights and obligations not included in a contract can be created between the Government and a contractor solely on the basis of an administrative regulation which has no specific statutory support.

1. Section VIII of ASPR Is Not Supported by Statutory Authority

This Association views the far-reaching effect of the decision below as creating an extremely dangerous and chaotic situation in the increasingly complex field of government contract law and, for this reason, strongly believes it should be reviewed and clarified..

The decision would open the door to the creation of contract rights and obligations by administrative regulation without any specific statutory support. Furthermore, it purports to give full force and effect of law to an entire series of procurement rules, only a portion of which are related to procurement and hence can be considered as properly implementing the Armed Services Procurement Act.

The Court of Claims has ruled that Section VIII of ASPR, prescribing the procedures and policies for the termination of contracts is based upon the authority of the Armed Services Procurement Act. No one would dispute the right of the Government to terminate or breach a contract made by it. This right exists as an incident of sovereignty. But what is involved here relates to the rights of the parties in determining damages arising out of a contract terminated by the Government. The court below has taken the position that these damages can be based upon an administrative regulation which was not implemented by the inclusion of a clause in the contract in question fixing the rights of the parties. And this, the lower court rules, is the controlling law because the Department of Defense has the authority to prescribe these rights under the Armed Services Procurement Act, which contains no statutory policies relating to the

settlement of damages in the event of a breach by the Government.

Petitioner's argument for certiorari recites several authorities in support of the point that the Armed Services Procurement Act has never been considered authority for prescribing the rights of parties to damages under defense contracts breached for the convenience of the Government. We know of no authority who has taken the opposite point of view. This general subject was discussed in "A Symposium on Contract Termination" in the July-September, 1954 issue of the *Federal Bar Journal*. On page 232, the author states:

> It would seem, therefore, that the validity of Section VIII of the Armed Services Procurement Regulation, the regulation applicable to all terminated defense contracts, is open to question insofar as it attempts to prescribe a basis for settlement not specifically covered by contract. *The argument that the Termination Regulation has statutory support in the Armed Services Procurement Act of 1947 is valid only to the extent of prescribing procurement procedures and policies having no relationship to contract rights and obligations.* Any attempt *via* substantive rulemaking to prescribe terms and conditions of settlement *not expressly agreed upon* should be based upon statute setting forth a comprehensible legislative standard circumscribing the allowable area of administrative judgment and properly delegating authority to implement the standard within the prescribed discretion. The legal framework, therefore, for settling terminated contracts at present would seem to be limited to the express provisions of the Termination Clause and the portions of the regulations which have been specifically incorporated by reference. (Emphasis added.)

Thus, there is a general consensus among the authorities who have given serious consideration to this question that whatever statutory support may exist for Section VIII of ASPR in the Armed Services Procurement Act, its validity cannot extend beyond terms and conditions expressly agreed upon by the parties and included in the contract. If the dignity of a contract is to be preserved and public confidence in our Government retained, it is extremely important that the principle of mutuality of obligation be kept—even in contracts to which the United States Government as a sovereign is a party.

Similar references to the lack of statutory authority to terminate contracts are found in various manuals of the branches of the Defense Department and in the Code of Federal Regulations. This Code (41 C.F.R. § 1-8.201(b), 1963) provides in part: "Thus, the contractual right to terminate a contract for the convenience of the Government and to make a settlement agreement . . . is based on such a clause. However, the power of a contracting activity to issue a termination notice does not depend on the existence of a termination for convenience clause in the contract. In the absence of a termination for convenience clause, however, such action normally constitutes a breach of contract."

Section VIII of ASPR was not issued until January 1952, but only after efforts to obtain peacetime termination legislation failed. Although the Armed Services Procurement Act was enacted in 1947, efforts continued until 1952 to secure passage of a contract settlement law.

Even assuming *arguendo* that ASPR Section VIII contains statutory authority, it does not resolve the

basic question of contract law that to be binding, it must be implemented *via* the inclusion of appropriate contract provisions. In this connection, the Georgetown Law Journal is quoted:

> Arguably, it would seem that statutes requiring the insertion of contract clauses would present the strongest case for binding the contractor to the terms of the statute by reading the clause into the contract. However, since such statutes have been construed as binding only on the contracting official to find that the regulations issued pursuant to such statutes bind a private contractor would be granting them greater "force and effect" than the enactment itself. This would seem especially anomalous in the existent case where the regulation involved is founded not on statutes requiring termination provisions, but only on the general power of department heads to issue regulations on the conduct of departmental activities. (51 *Geo. L.J.* 847, 1963); (cf. 40 *Comp. Gen.* 565, 1961; 20 *Comp. Gen.* 931, 1941; 20 *Comp. Gen.* 890, 1941; 41 CFR § 1-8.201(b), 1963.)

The Comptroller General stated this same general principle in a decision involving the omission from a contract of a provision required by the Eight Hour Laws of 1912. He held it inconceivable,

> . . . that the Act is automatically binding upon a contractor under a contract which does not contain its provisions. (20 *Comp. Gen.* 890, 1941)

It would therefore seem that the decision below was erroneous on two counts: (1) in holding that statutory authority existed for Section VIII of ASPR and (2) that such a provision could be made binding upon a contractor who had not agreed to its incorporation within a contract.

It should not be overlooked also that the Defense Department is not required to comply with Section 4 of the *Administrative Procedure Act*, which requires that proposed regulations be published in the Federal Register and an opportunity be extended to the public to comment thereon prior to final rulemaking. This practice has been generally accepted as part of administrative due process in the promulgation of substantive regulations. But in this case, we have an unusual situation in that not only is a contractor made subject to rights and obligations not included in his contract, but he is also subject to a regulation purportedly having the force and effect of law and which was promulgated without according him the opportunity to support or oppose it under the rulemaking procedures required by Section 4 of the *Administrative Procedure Act*.

Moreover, if the decision below is permitted to stand, it can readily be interpreted as effectuating a complete delegation of legislative power to the Defense Department for the development of contract policies and procedures in all areas related to military procurement. Thus, the Defense Department could prescribe so-called procurement policies dealing with broad areas seeking economic and social ends, including problems involving labor-management relations. If the Armed Services Procurement Act authorizes substantive law-making in the settlement of contract rights not made part of a contract, it can be argued that it authorizes such law-making for other areas related to procurement but not specifically covered by that Act. Thus, the decision below raises the very serious question: What are the statutory limits on the exercise of

administrative rule making under the Armed Services Procurement Act?

Where no clause has been included to establish otherwise the basis for determining damages under a contract terminated at the Government's convenience, it is accepted law that the contractor is entitled to common law damages. *United States* v. *Speed*, 75 U.S. 77 (1868). Otherwise, the contractor would be deprived of his property without due process of law.

Because contract rights and obligations are involved, they should not be destroyed by administrative edict, especially where there is no statutory authority clearly establishing a legislative policy in the procurement area involved. Certainly, contract rights and obligations should not be allowed to be created solely by an administrative regulation not implementing a specific statutory policy and under circumstances in which such rights were not spelled out in a contract.

To carry this concept further, every contract between defense prime contractors and the thousands of subcontractors also would be subject to the automatic inclusion of contract clauses prescribed by administrative regulation. This results in a situation in which the contract rights and obligations between private parties are fixed by administrative rule, rather than by specific statutory authority or by appropriate clauses included in a contract. This is not rule by law. We submit that contract rights and obligations not included in the provisions of a contract should never be considered as part of such contract unless properly implementing a statute specifically dealing with the subject matter relating to such rights and obligations and made mandatory, whether included or not in the contract.

2. The Court of Claims Decision, If Allowed to Stand, Will Have An Adverse Effect on Future Government-Industry Contract Relations

The Federal Government awarded $29,378,720,000 in military procurement contracts between July 1962 and June 1963. During this period, $4,301,101,000 of the total amount went to small business firms. (Exhibit A). These dollar figures represent 8,058,560 contract actions which include awards, amendments, terminations, or other changes in a prime contract), 5,638,116 of which concerned small business firms. (Exhibit B). These staggering amounts of dollar figures and contract actions indicate the magnitude of the military procurement program and the number of times which the Armed Services Procurement Regulation and the implementing regulations of the various military services come into play. The decision below has cast a heavy shadow of doubt and uncertainty over this entire field of contracting. No longer would it be possible to define the rights of the parties to a military procurement contract. The mutual agreement of the parties and their written memorandum of that agreement no longer will suffice if the decision in the instant case is upheld.

The especially harmful effect of the decision below upon the small entrepreneur, either as contractor or subcontractor, is readily foreseeable. The parties are no longer governed by a contractural agreement but rather by the whole of ASPR. Additionally, Section 1.108 of ASPR gives the military departments and subordinate organizations thereof power to issue their own implementing regulations, the issuance of which is not subject to the administrative due process pro-

cedures provided in Section 4 of the *Administrative Procedure Act* (5 U.S.C. Sec. 4).

Without a legal staff to interpret these ever-changing regulations, and in many instances with no notice of, or access to, the regulations themselves, the small contractor or subcontractor is at an insurmountable disadvantage. The larger contractor is similarly without a means of determining what "regulations" may later be read into his contract and said to have "statutory authority" and the "force and effect of law." The adverse effect of this situation is widely recognized throughout the membership of the Electronic Industries Association and indeed throughout the entire government contracting community. A quote from *The Government Contractor*, published by Federal Publications, Inc. (5 Govt. Cont. ¶57, 1963) is illustrative. In commenting on the *Christian* decision below, it states:

> Moreover, from a practical standpoint, the burden which the instant decision imposes on contractors might well prove to be intolerable. If carried to its possible extreme, for example, the decision could require a prospective contractor to search not only the entire ASPR, but the implementing regs of the particular military service with which he is contracting (AFPI, APP or NPD) in order to determine exactly what his contractual obligation may be—even though the *contract itself* contains *no references* to any portions of those regs. Such a task might involve "hairline" determinations by contractor as to whether particular provisions of the regs are—or are not—applicable to his contract. Illustrative of this is the instant case itself, wherein it was certainly not free from doubt that ASPR applied to Capehart contracts . . . (Emphasis added).

The confusion caused by the decision below is added when one considers whether the rule laid down therein is available for the use of either party. In *School District 2 Practional* v. *United States*, 229 F. 2d 68 (6th Cir. 1956), there seems to be some authority for so holding.

One of the most incisive comments on the decision below, further confirming its harmful effects, is to be found in the *Georgetown Law Journal* (51 Geo. L.J. 842, 1963) at page 850:

> Underlying the above instances in which the instant court deviated from prior law is the most significant aspect of its decision, namely, the court's use of the syllogistic statement, "As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including 8.703, had the force and effect of law." By so stating, the court has reinforced the concept that any regulations issued pursuant to statute, without more have a binding effect on private parties as great as if the regulation were a statutory command of Congress. The growing backlog of such language, although usually in dicta, has begun to provide a dangerous source of pronouncements which eventually may be called on to substantiate a holding to that effect. Such statements ignore entirely the need at least for an examination of the statutory authority on which such regulations are based, and whether the requirements of the Federal Register Act have been met. In the logical extreme, toward which this decision takes a gigantic step, an internal regulation, circulated only within a particular procurement department, may be found to bind a private contractor to an obligation or liability neither known by the contractor to be involved in the contractual relationship nor included or intended to be included in the contract itself.

CONCLUSION

The Electronic Industries Association believes that the decision of the Court below is not legally sound, and if permitted to stand, will create confusion and uncertainty in this increasingly complex field of Government contract law. Therefore, we respectfully support the petition for certiorari made herein and urge that it be granted.

Respectfully submitted,

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EXHIBIT A

MILITARY PRIME CONTRACT AWARDS
AND
SUBCONTRACT PAYMENTS
July 1962—June 1963
OFFICE OF THE SECRETARY OF DEFENSE

TABLE I

AWARDS BY TYPE OF CONTRACTOR (JULY - JUNE) a/

(Amounts in Thousands)

Type of Contractor	July 1961 - June 1962					July 1962 - June 1963					
	Total	Army	Navy	Air Force	Defense Supply Agency b/	Total	Army	Navy	Air Force	Defense Supply Agency	Other Defense Agencies
TOTAL	$29,254,502	$7,155,735	$8,766,618	$11,769,112	$1,563,037	$29,370,720	$6,364,736	$8,235,200	$11,918,441	$2,670,344	$189,999
Actions of Less Than $10,000	2,932,362	1,041,855	883,441	813,234	193,832	3,043,729	847,305	660,733	837,960	472,731	c/
Actions of $10,000 or More	26,322,140	6,113,880	7,882,677	10,955,878	1,369,205	26,326,991	5,517,431	7,574,467	11,080,481	2,197,613	189,999
INTRAGOVERNMENTAL	1,455,481	400,910	216,043	472,165	61,363	346,516	37,631	102,389	144,999	16,636	4,951
Actions of Less Than $10,000	613,256	241,831	101,861	246,027	21,437	206,107	56,367	32,906	113,228	3,636	c/
Actions of $10,000 or More	842,225	159,079	114,082	224,138	39,926	140,409	21,264	69,483	31,771	13,020	4,951
FOR WORK OUTSIDE U. S.	1,434,099	679,918	402,519	275,423	76,239	1,276,839	520,013	152,226	268,581	32,436	2,583
Actions of Less Than $10,000	192,846	122,794	23,414	46,327	311	184,492	109,922	36,785	36,779	1,006	c/
Actions of $10,000 or More	1,241,249	557,124	379,101	229,096	75,928	1,086,347	410,091	115,441	231,802	326,430	2,583
EDUCATIONAL & NON-PROFIT INSTITUTIONS	497,483	93,471	147,439	254,580	53	617,846	85,840	176,918	316,161	276	38,651
Actions of Less Than $10,000	9,344	3,843	905	4,688	40	43,260	4,618	3,925	6,641	86	c/
Actions of $10,000 or More	487,929	89,628	146,476	249,892	13	604,586	81,230	174,993	309,520	192	38,651
BUSINESS FIRMS FOR WORK IN THE U. S. (SUB-TOTAL)	28,247,403	6,403,491	8,600,621	10,738,024	1,005,832	27,143,517	5,661,244	7,803,755	11,186,790	2,326,004	143,814
Actions of Less Than $10,000	2,316,726	672,912	751,603	520,192	166,019	2,684,870	676,312	709,127	676,312	468,035	c/
Actions of $10,000 or More	24,030,737	5,730,524	7,249,018	10,217,832	839,363	24,533,647	5,004,846	7,044,628	10,512,388	1,857,971	143,814
Small Business Firms	4,622,049	1,701,572	1,370,549	1,025,550	424,608	4,301,101	1,181,178	1,132,964	971,988	943,020	9,956
Actions of Less Than $10,000	1,368,006	465,531	409,653	311,831	180,991	1,398,970	357,789	429,859	320,362	284,960	c/
Actions of $10,000 or More	3,254,043	1,237,041	960,896	713,719	243,617	2,902,131	823,389	703,105	651,626	658,060	9,956
Other Business Firms	22,525,354	4,842,004	6,838,082	9,712,474	580,774	22,842,416	4,500,066	6,670,800	10,210,732	1,382,984	137,828
Actions of Less Than $10,000	740,720	209,381	287,950	208,361	34,028	1,285,900	318,523	279,268	349,932	183,071	c/
Actions of $10,000 or More	20,778,634	4,632,623	6,542,132	9,504,113	546,746	21,631,516	4,181,543	6,391,532	9,860,800	1,199,913	137,828
SMALL BUSINESS PERCENT OF BUSINESS FIRMS	17.7%	27.1%	17.1%	9.6%	46.3%	15.8% d/	20.8%	15.3%	8.7%	40.5%	4.2%
Actions of Less Than $10,000	64.0	68.9	62.0	60.0	73.9	55.0	52.9	54.5	48.5	60.9	c/
Actions of $10,000 or More	13.0	22.6	12.4	7.0	40.7	11.8	16.5	10.9	6.2	35.4	4.2

a/ For definitions and coverage, see Notes on Coverage.

b/ Includes awards since 1 January 1962, when procurement responsibility for certain common supplies was transferred from the military departments.

c/ An insignificant amount is included with actions of $10,000 or more.

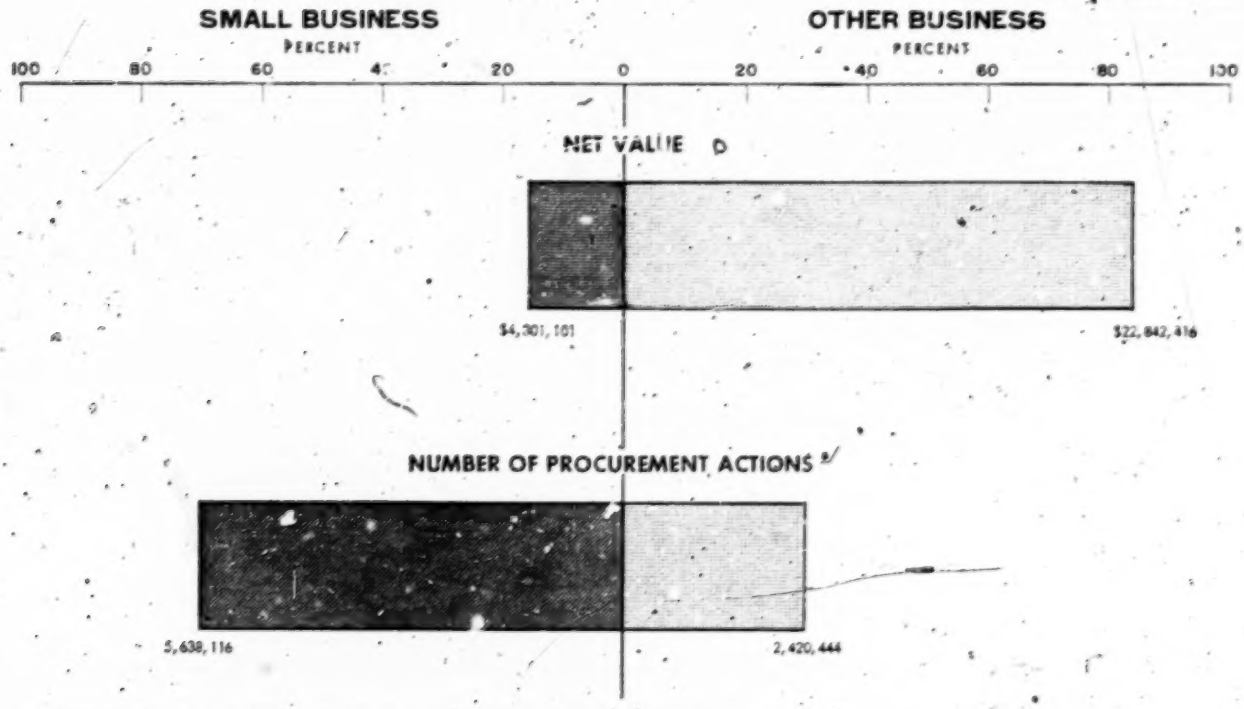
d/ Not comparable with fiscal year 1962 because of a change in reporting coverage. If reported on a comparable basis, the ratio would be 16.9 percent

CHART I

AWARDS TO SMALL AND OTHER BUSINESS FIRMS

JULY 1962 - JUNE 1963

MILITARY PRIME CONTRACT AWARDS
AND
SUBCONTRACT PAYMENTS
July 1962—June 1963
OFFICE OF THE SECRETARY OF DEFENSE



a/ AN ACTION MAY AWARD, AMEND, TERMINATE, OR OTHERWISE CHANGE A PRIME CONTRACT.

EXHIBIT B